

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRIAN SEYMOUR,

Plaintiff,

CASE NO. C15-5935-JLR-MAT

V.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

## REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Brian Seymour proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) under Title II after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further proceedings.

## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1979.<sup>1</sup> Plaintiff served in the U.S. Navy from 1998-2008. (AR 333.) Plaintiff has also worked briefly as a cashier, both before and after his military

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 service. (*Id.*) Plaintiff applied for DIB on October 16, 2012, alleging disability beginning  
2 January 1, 2009. (AR 20.) His application was denied at the initial level and on reconsideration.  
3 (AR 20.)

4 On July 23, 2013, ALJ Glenn Meyers held a hearing, taking testimony from plaintiff,  
5 plaintiff's father, and a vocational expert. (AR 43-87.) On April 22, 2014, a supplemental  
6 hearing was held and the ALJ took testimony from plaintiff and from a vocational expert. (AR  
7 88-119.) On June 13, 2014, the ALJ issued a decision finding plaintiff not disabled. (AR 20-  
8 34.)

9 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on  
10 October 21, 2015 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.  
11 Plaintiff then appealed this final decision of the Commissioner to this Court.

## 12 JURISDICTION

13 The Court has jurisdiction to review the ALJ's decision under 42 U.S.C. § 405(g).

## 14 DISCUSSION

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
18 engaged in substantial gainful activity since the alleged onset date of January 1, 2009. (AR 22.)  
19 At step two, it must be determined whether a claimant suffers from a severe impairment. The  
20 ALJ found plaintiff has the following severe impairments: diabetes mellitus, irritable bowel  
21 syndrome, migraines, cataracts, lumbar degenerative disc disease, generalized anxiety disorder,  
22 post-traumatic stress disorder (PTSD), alcohol abuse in remission, depressive disorder, history of  
23 attention deficit hyperactive disorder (ADHD), and marijuana abuse. (AR 22.) Step three asks

1 whether a claimant's impairments meet or equal a listed impairment. The ALJ found that  
2 plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 24.)

3 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
4 a claimant's residual functional capacity (RFC) and determine at step four whether the claimant  
5 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the  
6 residual functional capacity to lift and/or carry up to 20 pounds occasionally and 10 pounds  
7 frequently, stand and/or walk about six hours in an eight-hour workday, and sit about six hours in  
8 an eight-hour workday. (AR 24.) The ALJ further found that plaintiff can perform unskilled,  
9 repetitive routine work with no contact with the public and occasional contact with supervisors  
10 and co-workers and that plaintiff would be off task at work fourteen percent of the time, but still  
11 be able to meet minimum production requirements of the job and be absent from work once  
12 every three months and he cannot read small print. (AR 24.) Based on that assessment, the ALJ  
13 found plaintiff unable to perform any of his past relevant work. (AR 32.)

14 In step five of the sequential evaluation process, the burden shifts to the Commissioner to  
15 demonstrate that the claimant retains the capacity to make an adjustment to work that exists in  
16 significant levels in the national economy. Because the ALJ found the plaintiff could perform a  
17 full range of light work with the additional limitations specified in his RFC, the ALJ questioned  
18 a vocational expert (VE) to determine the extent to which these limitations would erode the  
19 unskilled light occupational base. (AR 33.) The VE identified representative jobs an individual  
20 with plaintiff's RFC could perform, such as laundry sorter, bottle line attendant, and small  
21 products assembler. (AR 33-34.) Based upon this testimony, the ALJ concluded that plaintiff  
22 could make a successful adjustment to other work and was not disabled. (AR 34.)

23 This Court's review of the ALJ's decision is limited to whether the decision is in

1 accordance with the law and the findings supported by substantial evidence in the record. *See*  
2 *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a  
3 scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind  
4 might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
5 Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
6 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
7 2002).

8 Plaintiff argues the ALJ erred in evaluating the opinion of his treating physician, Dr.  
9 Engstrom. Plaintiff also argues that the ALJ erred in determining his RFC, specifically attacking  
10 the finding he would be off task fourteen percent of the time. Based on these alleged errors he  
11 asks that the ALJ's decision be reversed and his case be remanded for an award of benefits. The  
12 Commissioner argues the ALJ's decision is supported by substantial evidence and should be  
13 affirmed.

14 DISCUSSION

15 A. Weighing the Medical Evidence – Dr. Engstrom's Opinion

16 In general, more weight should be given to the opinion of a treating physician than to a  
17 non-treating physician, and more weight to the opinion of an examining physician than to a non-  
18 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
19 contradicted by another physician, a treating or examining physician's opinion may be rejected  
20 only for ““clear and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396  
21 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be  
22 rejected without ““specific and legitimate reasons’ supported by substantial evidence in the  
23 record . . . .” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

1 Plaintiff contends the ALJ improperly rejected Dr. Engstrom's opinion and that this error  
2 was harmful because Dr. Engstrom's opinion establishes that plaintiff satisfies the paragraph B  
3 criteria for listings 12.02, 12.04, and 12.06.<sup>2</sup> The Commissioner responds that the ALJ gave  
4 valid reasons supported by substantial evidence for discounting this opinion. Dr. Engstrom is  
5 plaintiff's psychologist, and has treated him since 2010 for PTSD and depression. (AR 659-60.)  
6 In July 2013, Dr. Engstrom opined in a medical questionnaire that plaintiff "has a full range of  
7 reexperiencing, hyperarousal, and avoidance symptoms consistent with PTSD. More broadly he  
8 has difficulty trusting others and has considerable difficulty coping effectively with stress  
9 without dysregulation emotionally and behaviorally." (AR 660.) Dr. Engstrom further opined  
10 that plaintiff had marked limitations in his social functioning and activities of daily living. (AR  
11 661.) Dr. Engstrom found plaintiff moderately limited in his ability to sustain an ordinary  
12 routine without special supervision, ability to work with others without being distracted, ability  
13 to interact appropriately with the general public, ability to accept instructions and respond to  
14 criticism from supervisors, ability to get along with coworkers, ability to maintain socially  
15 appropriate behavior, and ability to respond appropriately to changes in the work setting. (AR  
16 661.) Dr. Engstrom noted plaintiff as being markedly limited in his social functioning, activities  
17 of daily living, ability to maintain concentration, ability to perform activities within a schedule,  
18 and ability to complete a normal workday and workweek without interruptions from  
19 psychologically based symptoms. (AR 661.) Dr. Engstrom opined that plaintiff had  
20 "considerable difficulty" coping with daily stressors, felt that plaintiff's ability to cope with  
21 workplace stress was limited, and concluded that plaintiff would benefit most from continued  
22 treatment before pursuing competitive employment. (AR 661-62.)

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23 <sup>2</sup>See 20 C.F.R. Part 404, Subpt. P, App. 1.

1 In assessing Dr. Engstrom's opinion the ALJ wrote:

2 While the claimant does have some limitations on his social and cognitive  
 3 functioning, the degree of limitation outlined by Dr. Engstrom is not entirely  
 4 supported by the record. For example, while the claimant was initially described  
 5 as angry or anxious on mental status examination, as he became more comfortable  
 6 with the evaluation, he relaxed and made appropriate eye contact and social  
 7 interaction with the examiner (See Ex. B17F/103). Furthermore, though he has a  
 8 history of irritability and difficulty getting along with others, the record supports  
 9 no more than moderate difficulties, which can be managed by limiting the  
 10 claimant's social interaction, as provided by the restriction to no contact with the  
 11 general public and limited contact with supervisors and co-workers . . . .

12 (AR 30.) The Court finds the ALJ's assessment of the record evidence related to Dr. Engstrom  
 13 to be incomplete. In discounting Dr. Engstrom's opinion, the ALJ cited only one record. (AR  
 14 30, 809-810.) This record was prepared by a social worker who saw plaintiff after he became  
 15 disruptive and verbally confrontational at the VA. (AR 809-810.) Yet, at the time that Dr.  
 16 Engstrom prepared the medical questionnaire, he had been plaintiff's treating psychologist  
 17 through the VA for three years. (AR 659.) The record contains many treatment notes from Dr.  
 18 Engstrom's sessions with plaintiff, as well as treatment notes by other VA providers who saw  
 19 plaintiff in relation to his mental health. (See, e.g., AR 432, 441-443, 445, 448, 455, 462-68,  
 20 477-81, 483-91, 504-05, 518, 526-27, 552-54, 556-57, 625-29, 632-34, 750-54, 760-61, 811-15  
 21 (Dr. Engstrom's treatment notes); *see also* AR 419-27 (treatment notes from hospitalization due  
 22 to psychological symptoms in 2012); AR 815-34 (treatment notes from emergency psychiatric  
 23 treatment in 2013); AR 492-95 (treatment notes from couples' counseling session). Dr.  
 Engstrom's treatment notes provide an important longitudinal view of the plaintiff.<sup>3</sup> The ALJ

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22 <sup>3</sup> Treating physicians are "most able to provide a detailed, longitudinal picture of [a claimant's]  
 23 medical impairment(s)." 20 C.F.R. § 404.1527(c)(2). A treating physician's opinion will be given  
 controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic  
 techniques and is not inconsistent with other substantial evidence in [the] case record." *Orn v. Astrue*, 495

1 failed to address the relationship of these notes to Dr. Engstrom's opinions in the medical  
2 questionnaire.

3 The Commissioner is required to give weight to a treating physician's subjective  
4 judgments as well as his clinical findings and interpretation of test results. *Lester*, 81 F.3d 821,  
5 832-33 (9th Cir. 1995). An ALJ may properly reject a treating doctor's opinion by "setting out a  
6 detailed and thorough summary of the facts and conflicting evidence, stating his interpretation  
7 thereof, and making findings." *Magallanes*, 881 F.2d at 751. "The ALJ need not accept the  
8 opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and  
9 inadequately supported by clinical findings." *Thomas*, 278 F.3d at 957. In finding that the  
10 opinion is "not entirely supported by the record" the ALJ failed to adequately discuss whether  
11 Dr. Engstrom's treatment notes support the conclusions stated in the questionnaire. With ample  
12 treatment notes in the record regarding plaintiff's mental health from Dr. Engstrom and other  
13 providers, the ALJ was required to give a more detailed summary of the evidence, its conflicts,  
14 and the ALJ's ultimate interpretation of that evidence in discounting Dr. Engstrom's opinion.  
15 *Magallanes*, 881 F.2d at 751.

16 Further, to the extent that ambiguity exists between Dr. Engstrom's treatment notes and  
17 his opinion in the medical questionnaire, the ALJ must resolve this ambiguity before discounting  
18 Dr. Engstrom's opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (the ALJ  
19 has an "independent duty to fully and fairly develop the record," and ambiguous evidence, or the  
20 ALJ's finding that the record is inadequate, triggers the ALJ's duty to "'conduct appropriate  
21 inquiry.'") (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)). If deeper analysis of  
22 the record yields ambiguity as to Dr. Engstrom's opinion, the ALJ must fulfill his duty to

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23 F.3d 625, 631 (9th Cir.2007).

1 investigate and resolve such ambiguity.

2       The Commissioner additionally argues in defense of the ALJ's decision that Dr.  
3 Engstrom's opinion was controverted by the opinions of state agency reviewing psychological  
4 consultants, that his opinion failed to provide reasonable medical basis for the assessed  
5 limitations, did not cite to "objective clinical evidence," and "Dr. Engstrom conspicuously failed  
6 to provide any explanations or citations to medical evidence in support of these assessments."  
7 (Dkt. 17 at 3-6.) The Court rejects these arguments at this point in time because none of this  
8 rationale was utilized by the ALJ in discounting Dr. Engstrom's opinion. *Bray v. Comm'r of*  
9 SSA, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (court reviews ALJ's decision "based on the  
10 reasoning and factual findings offered by the ALJ -- not post hoc rationalizations that attempt to  
11 intuit what the adjudicator may have been thinking.") (citing, *inter alia*, *SEC v. Chenery Corp.*,  
12 332 U.S. 194, 196 (1947)).

13       The ALJ failed to reconcile Dr. Engstrom's opinion with the record evidence of his  
14 treatment notes and the treatment notes of other mental health providers. In view of these  
15 circumstances, the Court finds the ALJ harmfully erred in weighing the medical evidence. The  
16 ALJ did not supply "clear and convincing" or "specific and legitimate reasons" for discounting  
17 Dr. Engstrom's opinion. The ALJ may also have failed to fulfill his duty to investigate and  
18 resolve ambiguity in the record before discounting the opinion of plaintiff's longtime treating  
19 psychologist. This error was harmful due to its effects on the sequential evaluation process.

20       B.     Plaintiff's Residual Functional Capacity

21       Plaintiff additionally argues that the ALJ erred in formulating plaintiff's RFC. In  
22 particular, plaintiff argues that the ALJ erred in finding that plaintiff would be off task fourteen  
23 percent of the time. Plaintiff alleges this finding was not based on evidence of plaintiff's

1 impairments, but rather was guided by the content of the vocational expert's testimony. (Dkt. 16  
 2 at 6-7.) The Commissioner argues that the ALJ reasonably translated and incorporated all  
 3 credible limitations in the RFC finding.

4 At step four, the ALJ must identify a claimant's functional limitations or restrictions, and  
 5 assess his work-related abilities on a function-by-function basis, including a required narrative  
 6 discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can do  
 7 considering his limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting  
 8 effects of all of plaintiff's impairments, including those that are not severe, in determining his  
 9 RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p. Additionally, an ALJ must consider a claimant's  
 10 "ability to work on a sustained basis." 20 C.F.R. §§ 404.1512(a), 416.912(a). An ALJ must  
 11 assess all the evidence including a claimant's testimony and medical reports to determine what  
 12 capacity a claimant has for work despite his impairments. 20 C.F.R. §§ 404.1545(a), 416.945(a).  
 13 Finally, the ALJ "must consider only limitations and restrictions attributable to medically  
 14 determinable impairments." SSR 96-8p.

15 Here, the ALJ formulated plaintiff's RFC to include the following limitation, "[t]he  
 16 claimant would be off task at work 14 percent of the time, but still be able to meet minimum  
 17 production requirements of the job." (AR 27.) However, the ALJ failed to provide an  
 18 explanation or cite to record evidence to specifically support the finding that plaintiff would be  
 19 off task fourteen percent of the time. (*See* AR 27-32.) Only one medical record directly  
 20 addresses the likely amount of time plaintiff would be off task due to his symptoms and  
 21 limitations. Dr. Davis<sup>4</sup> opined that plaintiff would be off task fifty percent of the time and would  
 22 be expected to miss more than two full days of work per month due to his symptoms. (AR 707.)

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23 <sup>4</sup>Dr. Davis provided his opinion after seeing plaintiff one time to establish care. (AR 705.)

1       The ALJ discounted Dr. Davis' opinion because he had seen plaintiff one time when he  
 2 rendered the opinion and "a review of the record from that treatment visit indicates that the  
 3 claimant demonstrated no motor or sensory deficits in the extremities, and no other significant  
 4 abnormalities." (AR 30.)<sup>5</sup> The ALJ found that Dr. Davis' evaluation of the claimant "does not  
 5 support the restrictive limitations outlined in his opinion form" and gave the opinion "little  
 6 weight." (*Id.*) The ALJ did not specifically address the discrepancy between Dr. Davis' off task  
 7 assessment and the formulation in the RFC. (*See id.*) The ALJ also did not discuss Dr.  
 8 Engstrom's opinion on this issue. Although Dr. Engstrom did not provide a specific estimation  
 9 for the amount of time plaintiff would be off task at work, he did opine, similar to Dr. Davis, that  
 10 plaintiff would require unscheduled breaks due to his mental health issues, diabetes, and chronic  
 11 pain, and further estimated that plaintiff would be absent from work more than sixteen hours per  
 12 month. (AR 662.)

13       Without a specific explanation as to the record evidence supporting the finding that  
 14 plaintiff would be off task fourteen percent of the time, the finding appears result-oriented. (*See*  
 15 AR 114-15) (vocational expert testimony regarding employer toleration of off task time and  
 16 erosion of the labor market beyond fourteen percent off task during the work day.) A claimant's  
 17 RFC is to be formulated based on the limiting effects of plaintiff's impairments, evaluating all  
 18 evidence to determine a claimant's capacity for work. RFC. §§ 404.1545(e), 416.945(e); SSR  
 19 96-8p. The ALJ's RFC determination lacks adequate explanation to show that is supported by  
 20 substantial evidence in the record and is free of legal error. Accordingly, the Court finds that the  
 21 RFC finding should be reevaluated on remand. *Smolen*, 80 F.3d at 1279.

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23       <sup>5</sup> Neither the ALJ, nor the parties, supply a citation to this treatment record.

1 C. Credit as True

2 Plaintiff requests that the Court credit Dr. Engstrom's opinion as true and remand this  
 3 case for an award of benefits.

4 "Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a  
 5 treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81  
 6 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited as true,  
 7 plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.  
 8 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,  
 9 the evidence supports a finding of disability. *See, e.g., Smolen*, 80 F.3d at 1292 (ALJ's  
 10 reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony  
 11 legally insufficient; finding record fully developed and disability finding clearly required);  
 12 *Garrison v. Colvin*, 759 F.3d 995, 1019-20 (9th Cir. 2014) (crediting evidence as true and  
 13 remanding for benefits where ALJ supplied inadequate reasons for discounting medical opinions  
 14 and rejecting claimant testimony, the record was fully developed, further administrative  
 15 proceedings would serve no useful purpose, and finding of disability was required.)

16 However, courts retain flexibility in applying this "'crediting as true' theory." *Connett v.*  
 17 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there  
 18 were insufficient findings as to whether plaintiff's testimony should be credited as true).  
 19 Therefore, applying the "credit-as-true" rule "is not mandatory when, even if the evidence at  
 20 issue is credited, there are 'outstanding issues that must be resolved before a proper disability  
 21 determination can be made.'" *Luna v. Astrue*, 623 F.3d 1032, 1035 (9th Cir. 2010) (quoting  
 22 *Vasquez v. Astrue*, 572 F.3d 586, 593 (9th Cir. 2009)). Likewise, a court retains flexibility in  
 23 remanding a case for further proceedings "when the record as a whole creates serious doubt as to

1 whether the claimant is, in fact, disabled within the meaning of the Social Security Act.”  
2 *Garrison*, 759 F.3d at 1021.

3 Even if plaintiff had adequately demonstrated that Dr. Engstrom’s opinion should be  
4 credited as true, the Court would not be required to remand this case for an award of benefits.  
5 Further development and analysis of the record is necessary. The Commissioner correctly argues  
6 that significant contradictions in the medical evidence must be resolved, noting conflict between  
7 the determinations of two state agency consultants and the conclusions reached by Dr. Engstrom.  
8 (Dkt. 17 at 11.) Opinion evidence from state agency reviewing physicians cannot by itself  
9 constitute substantial evidence justifying a rejection of the opinion of either an examining or a  
10 treating physician. *Lester*, 81 F.3d at 831. However, opinions of state agency reviewing  
11 physicians may suffice to establish conflict among the medical opinions of record. *Widmark v.*  
12 *Barnhart*, 454 F.3d 1063, 1066 n.2 (9th Cir. 2006).

13 Furthermore, as noted by the Commissioner, in assessing plaintiff’s credibility, the ALJ  
14 found that the record suggests plaintiff may be motivated by secondary gain. (AR 28.) The ALJ  
15 cited a clinician’s note stating that plaintiff was “highly somatic” and “disability focused.” (AR  
16 28, 550.) The ALJ also expressed concern that plaintiff may purposefully be manipulating his  
17 medical treatment and failing to control his diabetes to enhance his disability rating with the VA.  
18 (AR 28, 835.) Given these concerns as to whether plaintiff is actually disabled within the  
19 meaning of the Social Security Act, remand for further proceedings is appropriate. *Garrison*,  
20 759 F.3d at 1021.

21 D. Scope of Remand

22 On remand, the ALJ should reassess the medical evidence of record and supplement the  
23 record as necessary. This may require contacting Dr. Engstrom to obtain clarification for the

1 basis of the opinions stated in his medical questionnaire. The ALJ should reevaluate steps three  
2 through five in the sequential evaluation process, including reformulating Plaintiff's RFC, and  
3 issue a new decision.

4 CONCLUSION

5 For the reasons set forth above, the Court recommends that this matter be REVERSED  
6 and REMANDED for further proceedings consistent with this Report and Recommendation.

7 DEADLINE FOR OBJECTIONS

8 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
9 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
10 Recommendation is signed. Failure to file objections within the specified time may affect your  
11 right to appeal. Objections should be noted for consideration on the District Judge's motions  
12 calendar for the third Friday after they are filed. Responses to objections may be filed within  
13 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will  
14 be ready for consideration by the District Judge on September 9, 2016.

15 DATED this 24th day of August, 2016.

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18 Mary Alice Theiler  
19 United States Magistrate Judge  
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